Office - Supreme Court, U.S.
FILED
JUL 3 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 291

W. A. CANNON, *Petitioner*

v.

NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION, *Respondent*

Petition for a Writ of Certiorari to the Supreme Court of the State of North Carolina

W. P. BURKHIMER,
28 Odd Fellows Bldg.
Wilmington, N. C.

H. EDMUND RODGERS,
506 Murchison Bldg.
Wilmington, N. C.

Counsel for Petitioners.

Printed by Carolina Printing Company, Wilmington, N. C.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Laws Involved	4
Statement	4
Reasons for Granting the Writ	7
Conclusion	18

	Appendix Page
APPENDIX A	
U. S. Constitutional Provisions	1
N. C. Constitutional Provisions	2
Statutes	4
APPENDIX B	
Opinion in *Cannon* v. *City*	18

TABLE OF CASES CITED

Cannon v. *City of Wilmington*, et al., 242 N. C. 711, 89 S. E. 2d 595 (1955) 2, 6, 7, 8, 11, 13, 17

Eason v. *Spence*, 232 N. C. 579, 61 S. E. 2d 717 10

Eller v. *Board of Education*, 242 N. C. 584, 89 S. E. 2d 144 (1955) 10, 11

Ivester v. *City of Winston-Salem*, 215 N. C. 1, 1 S. E. 2d 88 ..... 8, 10

McKinney v. *City of High Point*, 237 N. C. 66, 74 S. E. 2d 440 (1953) 8, 11

McKinney v. *City of High Point*, 239 N. C. 232, 79 S. E. 2d 730 (1954) 8

Moore v. *Clark*, 235 N. C. 364, 70 S. E. 2d 182 (1952) 8

Proctor v. *State Highway, etc., Comm.*, 230 N. C. 687, 55 S. E. 2d 479 (1949) 8, 10

Rhodes v. *City of Durham*, 165 N. C. 679, 81 S. E. 938 8

Sale v. *State Highway and Public Works Commission*, 242 N. C. 612, 89 S. E. 2d 290 (1955) 10, 11

Sanders v. *Atlantic Coast Line R. Co.*, 216 N. C. 312, 4 S. E. 2d 902 10

TABLE OF LAWS CITED

CONSTITUTIONAL PROVISIONS

	Page
Preamble to U. S. Constitution	14
First Amendment to U. S. Constitution	4
Fifth Amendment to U. S. Constitution	3, 4, 6, 8, 15
Fourteenth Amendment to U. S. Constitution, § 1	3, 4, 6, 14, 15

NORTH CAROLINA CONSTITUTION

Article I	
§ 1	3, 4
§ 2	4
§ 9	3, 4
§ 17	3, 4, 6, 8, 10, 17
§ 18	4, 14
§ 19	3, 4, 14
§ 29	4, 17, 18
§ 35	3, 4, 14
§ 37	4, 16
Article IV, § 9	1, 4, 6

STATUTES

28 U. S. C., § 1257(3)	2
General Statutes of North Carolina:	
§ 1-228	4, 12
§ 7-8	1, 4, 6
§ 7-9	1, 4, 6
§ 40-12 (Chapt. 40, "*Eminent Domain*")	8, 10, 11, 17
§ 47-27	4, 12
§ 136-5	4, 6
§ 136-6	4, 6
§ 136-18	4, 6
§ 136-19	4, 6, 10, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

W. A. CANNON, *Petitioner*

v.

NORTH CAROLINA STATE HIGHWAY & PUBLIC WORKS COMMISSION, *Respondent*

Petition for a Writ of Certiorari to the Supreme Court of the State of North Carolina

---

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered in the above cause on 21 March 1956, denying, without hearing, or even pleading by the Respondent, the Petitioner's application for writ of mandamus from the Supreme Court of North Carolina. This action was filed originally in the North Carolina Supreme Court under the provisions of § 9 of Article IV of the Constitution of the State of North Carolina and § 8 and § 9 of Chapter 7 of the General Statutes of the State of North Carolina.

[Note: The North Carolina State Highway and Public Works Commission is herein referred to as the Respondent, whether it be in discussions of the instant action or in discussions of the prior action. The other defendant in the prior action is herein referred to as The City.]

OPINIONS BELOW

The only opinion in the instant case is that of the North Carolina Supreme Court. However, in the opinion in another prior case, entitled "W. A. CANNON v. CITY OF WILMINGTON, NORTH CAROLINA; and NORTH CAROLINA STATE HIGHWAY and PUBLIC WORKS COMMISSION." (242 N.C. 711, 89 S.E. 2d 595 (1955); Appendix B; herein referred to as *Cannon* v. *City*), referred to in the Petitioner's complaint, the North Carolina Supreme Court, on the grounds that it did not state a cause of action over which the court had jurisdiction, sustained Respondent's demurrer to this Petitioner's complaint in *that* action.

JURISDICTION

The judgment of the Supreme Court of North Carolina was dated and entered 21 March 1956. By order of this Court entered 18 June 1956 by Associate Justice Hugo L. Black, the Petitioner's time for filing petition for writ of certiorari was extended to and including 6 August 1956.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., § 1257(3).

The federal questions herein presented were raised in North Carolina Supreme Court by the complaint (especially Paragraphs 5 through 15, both inclusive). Without any pleadings being filed by Respondent the Supreme Court of North Carolina denied Petitioner's application, or complaint, for a writ of mandamus and did not specifically pass upon the federal questions presented. The opinion of the North Carolina Supreme Court in *Cannon* v. *City*, dismissing this Petitioner's complaint to quiet title as to the Respondent, indicated that: "Certainly, if defendant Commission claims a right of way over plaintiff's land, plaintiff is entitled as a matter of right to require that defendant define with par-

ticularity the location and extent of its claim; and, if it refuses or fails to do so, plaintiff can invoke the remedy of mandamus." The North Carolina Supreme Court did not render a decision as to whether the acts of the Respondent, in appropriating private property to public use merely by claiming easements for highway right-of-ways over private property without following either of the statutory procedures (deed or condemnation), violate either the statutory or constitutional (state or federal, or both) provisions, or both, where the Respondent either actually takes possession and use of the lands or merely claims that its easement or ownership extends over the lands. This Petitioner has alleged that any such claims of the Respondent to any possession or interest whatsoever in, on, or over, such properties are invalid as violations of both constitutions, as well as the statutes, in that such claims amount to taking private property for public use without either due process of law or just compensation.

Thus, Petitioner has exhausted his remedies in the Courts below.

The judgment of the North Carolina Supreme Court is final by its terms, in that it denies the relief sought.

QUESTIONS PRESENTED

1. Whether the acts of the State of North Carolina, acting through its agency, the North Carolina State Highway and Public Works Commission, in claiming ownership or possession, or both, of some of Petitioner's lands for a perpetual easement for right of way for highway purposes without acquiring any title thereto, violate the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States as well as the provisions of §§ 1, 9, 17, 19, and 35 of Article I of the Constitution of the State of North Carolina.

2. Whether the State, acting through one of its agencies, can validly appropriate private property for public use by merely claiming ownership or taking possession thereof, or both.

3. Whether the acts of North Carolina State Highway and Public Works Commission, acting for the State of North Carolina, in entering upon and taking possession of private property and never acquiring title by either "purchase, donation, or condemnation" constitute violations of its prescribed duties.

LAWS INVOLVED

The statutory provisions involved are North Carolina General Statutes, § 1-228; § 7-8; § 7-9; § 47-27; § 136-5; § 136-6; § 136-18, and § 136-19.

The constitutional provisions involved are:

Constitution of North Carolina, Article I, §§ 1, 2, 9, 17, 18, 19, 29, 35, 37, and Art. IV, § 9; and

Constitution of the United States First, Fifth and § 1 of Fourteenth Amendments.

All of the above mentioned laws are set forth in Appendix A hereto.

STATEMENT

Prior to 1939 a right of way for a street and highway, then known as the Carolina Beach Road, or Wilmington Beach Boulevard, or Carolina Beach Boulevard, or North Carolina Highway Number 40, existed as dedicated by maps of "Sunset Park" Subdivision, as developed by the Fidelity Trust and Development Company. The maps by which that right-of-way was dedicated by the Fidelity Trust and Development Company did not and do not indicate the width thereof as it then passed and now passes the Petitioner's property. In 1939 and several times since then the Respondent has improved the said road by paving and widening the pavement without

any regard whatsoever as to the location of the right-of-way as set up and dedicated by the said developer. In each instance the Respondent indicated that it was going to claim and acquire additional width for the easement of the right-of-way of said highway. However, in no instance has Respondent obtained any instrument conveying to it any of Petitioner's lands. Nor has Respondent ever instituted in any court of this State any proceedings for the condemnation of any of the Petitioner's property. Further, Respondent has never furnished the Petitioner with any description of such of his property as Respondent desired or claimed for said easement and has never paid or offered to pay to Petitioner any compensation whatsoever for such of Petitioner's lands as Respondent desired or desires for highway purposes. W. A. Cannon is and has been the record title owner of and in use and possession of said lands for 22 years or more. There is no record title in the Respondent nor any proceeding by Respondent divesting Cannon of any of his lands, despite the fact that Respondent claims to have acquired such right-of-way in 1939. In 1946 the city limits of the City of Wilmington were extended from a point several blocks northwardly of Petitioner's property to a point several blocks southwardly of Petitioner's property.

On 28 February 1955 in the Superior Court in and for New Hanover County, North Carolina, Petitioner filed complaint against Respondent and the City, asking that the cloud of their claims be removed from his title and for damages thereto resulting from such injury to his title and impairment of the use and enjoyment of his property. Both defendants therein separately demurred to the jurisdiction of that Court over them and over the subject-matter of the action, which demurrers were sustained by the Superior Court. On appeal the Supreme Court of North Carolina affirmed the judg-

ment as to the Respondent, thereby sustaining its demurrer and dismissing that action as to the Respondent; but reversed the judgment as to the City, thereby overruling its demurrer and remanding that case to the Superior Court of New Hanover County, North Carolina, for further proceedings and trial as to the City. That opinion of the North Carolina Supreme Court, reported in 242 N.C. 711, 89 S.E. 2d 595, filed 12 October 1955 (Appendix B), indicated to Petitioner the present action for mandamus, which was filed in the Supreme Court of the State of North Carolina on 20 March 1956, as an action under the provisions of § 9 of Article IV of the Constitution of the State of North Carolina and §§ 7-8 and 7-9 of the General Statutes of North Carolina (Appendix A, pages 3-5). On 21 March 1956, without any pleadings being filed by Respondent or any hearing, the Supreme Court of North Carolina denied Petitioner's application for writ of mandamus.

Petitioner's complaint, or application, for writ of mandamus is based upon the allegations that acts of the Respondent, in claiming against Petitioner's property title to and right of possession of a perpetual easement for the right of way for its said highway, which it has not acquired by "either purchase, donation, or condemnation," violate the oaths of office of the members of Respondent in that the said acts offend the provisions of Fifth and Fourteenth Amendments to the Constitution of the United States of America and § 17 of Article I of the Constitution of the State of North Carolina, as well as the provisions of Chapter 136 of the General Statutes of North Carolina. Such acts amount to a taking of private property for public use without just compensation and to depriving Petitioner of his property without due process of law. Chapter 136 of the General Statutes of North Carolina does not provide any such method for Respondent to acquire either title to or right to posses-

sion of right-of-ways or lands for highway purposes, but limits Respondent's methods therefor to "either purchase, donation, or condemnation." Such acts leave the status of Petitioner's title to said lands and Petitioner's right to possession of his lands in doubt, because Repondent has done and will do nothing to acquire record title to such of Petitioner's property as Respondent needs or desires, thereby depriving Petitioner of the full use and enjoyment of his property, of the fruits of his own labor, and of his property, without due process of law.

REASONS FOR GRANTING WRIT

1. The decisions of North Carolina Supreme Court in the instant case and in the prior case of *Cannon* v. *City* are directly in conflict with the provisions of the Constitution of the United States, the Constitution of the State of North Carolina, and the statutory laws of the State of North Carolina.

Cannon v. *City* was brought primarily for clarifying the title to the Petitioner's real property. It was precipitated by the attempts of the Petitioner to lease the property for the construction of a service station thereon, which resulted in the attorney who searched title being forced to report to the lessee that he could not certify clear title in Cannon as to the full limits and extents of Petitioner's boundaries but would have to limit such certification to that portion of Cannon's lands which would most certainly be beyond any claims of Respondent. Such title attorney gave as his reason that he could find no record to indicate the extent of Respondent's claims against Petitioner's real property and could not tell where the true center-line of its right of way was located. When the North Carolina Supreme Court dismissed the action as to the Respondent, Petitioner had no adequate remedy at law, or equity, whereby to clarify his title except that of writ of mandamus, as indicated by

North Carolina Supreme Court in its opinion in *Cannon* v. *City* (242 N.C. 711 at page 714, 89 S.E. 2d 595 at page 597, Appendix B, page 20). Since Respondent has refused to "define with particularity the location and extent of its claim" and does not discuss with Petitioner the purchase of such of Petitioner's land as it desires, the special proceeding provided in North Carolina General Statutes § 40-12 is not open to Petitioner. *Proctor* v. *State Highway, etc., Comm.*, 230 N.C. 687, 55 S.E. 2d 479 (1949); *Moore* v. *Clark*, 235 N.C. 364, 70 S.E. 2d 182 (1952). Further, the North Carolina Supreme Court, in *Cannon* v. *City*, (Appendix B, page 20), held that Respondent has not "taken" any of Petitioner's property, a holding which we do not understand. In *McKinney* v. *City of High Point*, 237 N.C. 66, 74 S.E. 2d 440 at page 447 (1953), the Supreme Court of North Carolina held it was a taking of property for which the owner was entitled to just compensation where the erection of a water tank by a municipality "cheapened" McKinney's lands, which were located across the street from the water tank. In that case, again on page 447 of 74 S.E. 2d, the North Carolina Supreme Court said: "'"Public necessity may justify the taking, but cannot justify the taking without compensation,"'" citing many cases, and, "To hold otherwise would be in violation of the State and United States Constitutions. 'No person ought to be * * * disseized of his freehold, liberties or privileges * * * or in any manner deprived of his life, liberty, or property, but by the law of the land.' North Carolina Constitution, Art. 1, § 17, 'Nor shall private property be taken for public use, without just compensation.' U.S. Constitution, Amend. 5; *Rhodes* v. *City of Durham*, 165 N.C. 679, 81 S.E. 938; *Ivester* v. *City of Winston-Salem*, 215 N.C. 1, 1 S.E. 2d 88." The same case was again before the North Carolina Supreme Court, 239 N.C. 232, 79 S.E. 2d 730 (1954), and these holdings not disturbed.

Petitioner therefore contends that the acts of Respondent in creating a cloud upon his title to the said real property are a taking of private property for public use without either just compensation or due process of law, "in violation of the State and United States Constitutions," in that its value is "cheapened" thereby Petitioner further contends that the failure of Respondent to "define with particularity the location and extent of its claim" and to acquire a record title thereto is a taking of private property for public use without just compensation and without due process of law, in violation of the said Constitutions, in that it impairs Petitioner's full use and enjoyment of his said lands. If such description by Respondent of its claims against Petitioner's real property shows that Respondent is actually in possession of some of Petitioner's lands, we feel that there could be no doubt that there would be such a taking.

The procedure which Respondent follows as a general rule in regard to "acquisitions" of lands desired by it for highway purposes is to lay out the highway or the widening of the highway, to proceed to construct the highway or the widening of a highway, and to post notices at each end of the project and the proper court house doors. Then when six or twelve months expire without any claims being filed, Respondent considers that it has "acquired" title to lands or the easements included in the project. For several years (ten to twenty) this has been Respondent's general practice, rather than the exception. In relatively rare instances does Respondent secure deeds to the lands or easements, or use condemnation proceedings to acquire title to them. The result is great confusion in the State of North Carolina as titles to real properties abutting highways. This confusion is confounded by the fact that owners frequently find that the center lines thereof claimed by Respondent

do not correspond at all with the original center lines before such widenings. This procedure is not prescribed by law, either statutory or constitutional, as one of the methods by which Respondent may acquire such lands, or easements, or rights of way. General Statutes of North Carolina, § 136-19 (Appendix A, page 14), prescribes only *three* methods: purchase, donation, or condemnation by "the ways, means, methods, and procedure" of chapter 40, entitled "Eminent Domain."

In *Sale* v. *State Highway and Public Works Commission*, 242 N.C. 612, 89 S.E. 2d 290, opinion filed 28 September 1955, the North Carolina Supreme Court said:

> "This Court said in *Eason* v. *Spence*, 232 N. C. 579, 61 S.E. 2d 717, 721: 'Under Article 1, § 17, of the State Constitution, no person can be deprived of his property except by his own consent or the law of the land. The law of the land and due process are interchangeable terms.'
>
> "This Court said in *Eller* v. *Board of Education*, (242) N.C., (584), 89 S.E. 2d 144, 146: 'When private property is taken for public use, just compensation *must* be paid. (Emphasis added) * * * While the principle is not stated in express terms in the North Carolina Constitution, it is regarded as integral part of the "law of the land" within the meaning of Art. I, § 17.'
>
> "This principle is so grounded in natural law and justice that it is part of the fundamental law of the State. *Ivester* v. *City of Winston-Salem*, 215 N. C. 1, 1 S.E. 2d 88, and imposes upon a governmental agency taking or appropriating private property for public use a correlative duty to make just compensation to the owner of the property appropriated. *Proctor* v. *State Highway Comm.* 230 N.C. 687, 55 S.E. 479; *Sanders* v. *Atlantic Coast Line R. Co.*, 216 N.C. 312, 4 S.E. 2d 902.
>
> "* * * * *

"A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, and neither requires any law for its enforcement, nor is susceptible of impairment by legislation. (Citing many cases)

"* * * * *

"In this State when a person has been deprived of his private property for public use nothing short of actual payment, or its equivalent, constitutes just compensation. The entry of a judgment is not sufficient. (Citing cases)

"The courts of the land to preserve the liberty and rights and property of the people, must adhere to the plain stipulations of the fundamental law, and it will be a tragic day in the history of our democratic constitutional form of government, if the courts should ignore the clear mandates of the organic law."

It is to enforce this "correlative duty," which is also recognized in the statute granting powers the Respondent, that this action for writ of mandamus was brought and this Petitioner asks this Court for writ of certiorari to review the adverse decision of the court below. Also, the decisions in the two *Cannon* Cases would seem to be in irreconcible conflict with the principles set forth in the *Sale* Case, supra, and the *Eller* Case, supra, in that the *Cannon* decisions deny this Petitioner's remedy against the Respondent. It is true the first *Cannon* Case says that Petitioner's remedy for just compensation is "by special proceeding as provided in G.S. § 40-12, but that opinion also held that there had been no "taking" of Petitioner's property or any interest therein. So far we have been unable to determine what the court below considers a "taking." Therefore, that phase of the decision would seem to be in irreconcible conflict with the decisions of that court in such cases as *McKinney* v. *City of High Point*, supra page 8.

2. Thus, the instant case of great importance to determine whether these acts of Respondent conform its duties to the people of the State of North Carolina, as the same are defined in the State and Federal Constitutions and in the North Carolina Statutes. If the Respondent can use that procedure the burden will be placed upon the property owners to determine the description of the property desired by Respondent and to institute proceedings against Respondent to recover the "just compensation" prescribed by the Constitutions, even though it may be years later before the property owner discovers the extent of Respondent's desires. If Respondent's acts are proper, private property knows no safety from invasion at the will of the Respondent, and the owners can never be apprised of the quality and quantity of their ownership. If Respondent's method is valid, we in North Carolina are faced with a police state in which there is no defense against invasion and taking of our properties and no protection from being "disseized of his freehold, liberties or privileges." For these reasons Petitioner contends that this Court must open its doors by writ of certiorari in this case, for too long have the doors of the North Carolina courts been slammed in our faces.

In North Carolina we thought it was settled beyond peradventure that any claim of any interest in or to real property had to be in writing and properly recorded according to the prescribed statutory methods, except in cases of title by adverse possession, which do not here apply. (G. S. §§ 1-228; 47-27(3); Appendix A, pages 3 and 5). Now, Respondent comes along to claim that it can acquire title to lands desired by it for its purposes without any muniments, that all it needs do to acquire title to the desired real property or interest in real property is run its road by or over the lands and post notices at the court doors and at the ends of the project (whether it be 100 feet or 100 miles long). If that be correct or good law, how can we ever be expected to tell from

title search what lands are owned by whom? Since many descriptions are tied in with roads or highways as monuments for a beginning point or one or more calls, of which the right of way may have been altered or widened, what confounding of the confusion will not result? Such confusion confounded can be avoided by requiring the Respondent to perform its duties of acquiring such rights of way and title to such land as it needs by "either purchase, donation, or condemnation"—by either deed or court proceeding — whereby record is made of its claims in the county where the land lies.

Settlement of this question of whether Respondent's acts are valid is plainly in the public interest for the stabilization of titles to real property, if for no other reason. But, there is other reason. It is in the public interest to know how far a state or state agency — or any other governmental agency — can invade private property for supposedly public purpose without either just compensation or due process of law. It is in the general public interest to construct and maintain highways. It is *NOT* in the public interest to have the state's title to the lands or easements for those highways to be questionable. It is *NOT* in the public interest to allow Respondent's said acts to convert title to lands abutting highways from fee simple absolute to tenancies at the will of Respondent.

3. The decisions of the Court below are clearly erroneous. In *Cannon* v. *City* the North Carolina Supreme Court held as to the Respondent that no cause of action over which courts had jurisdiction was stated because that complaint alleged that Respondent's claims were and are invalid; but as to its co-defendant the City of Wilmington, North Carolina, on the same allegations, a good cause of action had been stated over which the court had jurisdiction, as well as jurisdiction over the parties. This seems to be conflicting. If no cause of action were stated

against Respondent because it was alleged that its claims were invalid and could not constitute a cloud on Petitioner's title, certainly the same rule would apply as to the City. However, what is a cloud but an invalid claim, since if it were valid it would constitute good title? That case tends to set up one rule of law as to the complaint therein against Respondent and another as to the complaint therein against the City, although they are co-defendants in the same action to remove the cloud of their claims against Petitioner's property.

However, in that case the North Carolina Supreme Court indicated that Petitioner should use the remedy of mandamus against Respondent, which Petitioner has done in the instant case. Now, the North Carolina Supreme Court denies Petitioner the remedy which it indicated to petitioner. It is not clear whether the North Carolina Supreme Court's order dated 21 March 1956 denies the writ of mandamus or denies the order for service of the complaint on the Respondent. In either instance it denies the relief sought. Therefore, if the doors of any court are to be open to Petitioner for relief against the illegal acts of Respondent it must be by certiorari to this Court. In order to "secure the blessings of liberty to ourselves and our posterity" (Preamble to the Constitution of the United States), in order to have "equal protection of the laws" (§ 1, Amend. XIV, Constitution of U. S.), in order that "every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed." (Art I, § 18, N. C. Constitution, Appendix A, pages 2 and 3), in order that "in all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people and ought to remain sacred and inviolable." (Art. I, § 19, N. C. Constitution, Appendix A,

page 3), and in order that "all court shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and right and justice administered without sale, denial, or delay." (Art. I, § 35, N.C. Constitution, Appendix A, page 3), we here apply to this Court as our last resort for relief. In the past we have fought off every known invasion and interference with the full use of Petitioner's lands. Now, if Petitioner is even to "know with certainty the exact limits of the appropriation made by" Respondent so that Petitioner may know of what part of his lands he has free and unfettered use, as well as that such may be made of record in the county wherein the land lies for future title searches, we need the relief of a favorable decision from this Court.

The decision of the court below is erroneous because it sanctions the hiding of the Respondent's abuse of its powers behind the cloak of governmental immunity. It was not intended that the governments of this Country could, except in times of emergency, take private property without either the written consent of its owner or court procedures—due process of law. The power of eminent domain is not inherent in our governments, but is a grant of power made in the organic law with the conditions precedent attached that it must be exercised by due process of law and payment of just compensation. The language of the Fifth Amendment to the Constitution of the United States exemplifies this: "No person *shall* * * * be deprived of life, liberty, or property, without due process of law; nor *shall* private property be taken for public use without just compensation." The language of the Fourteenth Amendment thereto is similar in its application to the states. Except by inference from the language of § 17 of Article I, of the North Carolina Constitution, (Appendix A, page 2), there is some serious doubt in my mind whether the government of the State of North Carolina has *ever* been granted the

power of eminent domain. Certainly, there is no specific delegation of that power in the North Carolina Constitution. In § 37 of Article I thereof the language is: "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people." (Appendix A, page 3). However, we will not here belabour that point. The main point is that, without the benefit of *any* process of law, Respondent contends that it has "acquired" a right of way over Petitioner's lands for its highway, while Petitioner contends that, in so doing, Respondent has acted beyond its powers and has been derelict in it duties by not acquiring it in one of the only *three* manners prescribed by law. The North Carolina Supreme Court, in denying Petitioner's application for mandamus, apparently sanctions Respondent's methods, which Petitioner claims violate both the Federal and State Constitutions, as a taking of private property without due process of law and without just compensation.

Respondent admits that it has never paid any compensation for such of Petitioner's lands as it may have "taken" and has never obtained any muniment thereto. Respondent m e r e l y says, in effect: "I've gone through here and claim to have acquired a right of way 100 feet wide wherever I want it, regardless of where the original right of way was dedicated by the developer of Sunset Park. I'm not going to pay you anything for any property I need; but, without deed, condemnation proceedings, compensation (just or otherwise), or any proceeding whatsoever, I have, by main force, hereby appropriated your property for this highway purpose to whatever limits and extents I desire. There's nothing you can do about it, either, for I'm the State of North Carolina and thereby immune to suit." This is what Petitioner says violates his constitutional rights. To enforce those constitutional rights Petitioner

says he is entitled to a writ of certiorari that this Court may adjudicate these important questions and that this Court may direct the issuance of such orders as will protect and preserve the constitutional rights of the people of the State of North Carolina, as well as this Petitioner.

To conform to the statute law and use one of the *three* prescribed methods for accuisition private property needed for its purposes would not hamper, delay, or hinder Respondent's operations. Such is provided for in the statute (G. S. § 136-19, Appendix A, page 14). Respondent's present methods are abuses of that provision which was made for its benefit. Again, it is those abuses that we here seek to abolish.

Citations of cases are relatively few. In this case we are not necessarily complaining of the invalidity of the statutes, but of the unconstitutionality of Respondent's misuse of the statutes. We feel that the law on taking property is so clear it would be a waste of space to give citations as to it.

Exhibits "A", "B", and "C", attached to Petitioner's original complaint in this action show that Petitioner has tried to lay the groundwork and preparations necessary for the "special proceeding as provided in G.S. § 40-12," by trying to obtain from Respondent a sufficient description of that part of Petitioner's real property which Respondent desires. However, it would seem clear from that correspondence that Respondent does not intend to comply with the mandate of the North Carolina Supreme Court in the first *Cannon* Case — unless, of course, the courts force it to do so. Respondent did not even bother to answer the letter set forth in Exhibit "C".

This cases strongly emphasizes the real meaning of § 29 of Article I of the Constitution of North Carol[illegible]:

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

W. P. BURKHIMER

H. EDMUND RODGERS
Counsel for Petitioner.

25 July 1956

APPENDIX

APPENDIX A

CONSTITUTION OF UNITED STATES OF AMERICA

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise of; or *abridging* the freedom of speech or of the press; or *the right of the people* peaceably to assemble, and *to petition the government for a redress of grievances.* (Emphasis added).

AMENDMENT V

No Person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.* (Emphasis added).

AMENDMENT XIV

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added).

CONSTITUTION OF NORTH CAROLINA

ARTICLE I

Declaration of Rights

That the great, general and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and Government of the United States, and those of the people of this State to the rest of the American People, may be defined and affirmed, we do declare:

§ 1. **The equality and rights of persons.** — That we hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness. (Constitution 1868; 1945, c. 634, s. 1.)

§ 2. **Political power and government.**—That all political power is vested in, and derived from, the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole. (Constitution 1868.)

§ 9. **Of the power of suspending laws.**—All power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people, is injurious to their rights, and ought not to be exercised. (Constitution 1868.)

§ 17. **No person taken, etc., but by law of land.** — *No person ought to be taken, imprisioned, or dissezed of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.* (Constitution 1868). (Emphasis added).

§ 18. **Persons restrained of liberty.**—Every person restrained of his liberty is entitled to a remedy to inquire

into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed. (Constitution 1868.)

§ 19. **Controversies at law respecting property.**—In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable. No person shall be excluded from jury service on account of sex. (Constitution 1868; 1945, c. 634, s. 1.)

§ 35. **Courts shall open.**—All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. (Constitution 1868).

§ 37. **Other rights of the people.**—This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people. (Constitution 1868.)

ARTICLE IV

§ 9. **Claims against the State.**—The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action. (Constitution 1868.)

General Statutes of North Carolina

§ 1-228. **Regarded as a deed and registered.**—Every judgment, in which the transfer of title is so declared, shall be regarded as a deed of conveyance, executed in due form and by capable persons, notwithstanding the want of capacity in any person ordered to convey, and shall be registered in the proper county, under the rules

and regulations prescribed for conveyances of similar property executed by the party. The party desiring registration of such judgment must produce to the register a copy thereof, certified by the clerk of the court in which it is enrolled, under the seal of the court, and the register shall record both the judgment and certificate. All laws which are passed for extending the time for registration of deeds include such judgments, provided the conveyance, if actually executed, would be so included. (1850, c. 107, ss. 2, 4; R. C., c. 32, ss. 25, 27; 1874-5, c. 17, ss. 2, 4; Code, ss. 427, 429; Rev. ss. 567, 568; C. C., s. 608).

§§ 7-8. **Original jurisdiction.** — This Supreme Court has original jurisdiction to hear claims against the State, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon, they shall be reported to the next session of the General Assembly for its action. (Rev., s. 1537; Constitution, Art. IV, s. 9; C. S. 1409.)

§§ 7-9. **Procedure to enforce claims against the State.** —Any person having any claim against the State may file his complaint in the office of the clerk of the Supreme Court, setting forth the nature and grounds of his claim. He shall cause a copy of his complaint to be served on the Governor, and therein request him to appear on behalf of the State and answer his claim. The copy shall be served at least twenty days before application for relief shall be made to the court. In case of an appearance for the State by the Governor, or any other authorized officer, the pleadings and trial shall be conducted in such manner as the court shall direct. If an issue of fact shall be joined on the pleadings, the court shall transfer it to the superior court of some convenient county for trial by a jury, as other issues of fact are directed to be tried, and the judge of the court before whom the trial is had shall certify to the Supreme Court,

at its next term, the verdict and the case, if any, made up and settled as prescribed in cases of appeal to the Supreme Court. If the State shall not appear in the action by any authorized officer, the court may make up issues and send them for trial, as aforesaid. The Supreme Court shall in all cases report the facts found, and their recommendation thereon, with the reasons thereof, to the General Assembly at its next term. (Rev., s. 1538; Code, s. 948; C. S. 1410.)

§ 47-27. **Deeds of easements.**—All persons, firms, or corporations now owning or hereafter acquiring any deed or agreement for rights of way and easements of any character whatsoever shall record such deeds and agreements in the office of the register of deeds of the county where the land affected is situated. Where such deeds and agreements may have been acquired, but no use has been made thereof, the person, firm, or corporation holding such instrument, or any assignment thereof, shall not be required to record them until within ninety days after the beginning of the use of the easements granted thereby. If after ninety days from the beginning of the easement granted by such deeds and agreements the person, firm, or corporation holding such deeds or agreements has not recorded the same in the office of the register of deeds of the county where the land affected is situated, then the grantor in the said deed or agreement may, after ten days' notice in writing served and returned by the sheriff or other officer of the county upon the said person, firm, or corporation holding such lease or agreement, file a copy of said lease or agreement for registeration in the office of the register of deeds of the county where the original should have been recorded, but such copy of the lease or agreement shall have attached thereto the written notice above referred to, showing the service and return of the sheriff or other officer. The registration of such copy shall have the

same force and affect as the original would have had if recorded: Provided, said copy shall be duly probated before being registered.

Nothing in this section shall require the registration of the following classes of instruments or conveyances, to wit:

1. * * * *

2. * * * *

3. It shall not apply to decrees of a competent court awarding condemnation or confirming reports of commissioners, when such decrees are on record in such courts.

4. * * * *

No deed, agreement for right of way, or easement of any character shall be valid as against any creditor or purchaser for a valuable consideration but from the registration thereof within the county where the land affected thereby lies. (1917, c. 148; 1919, c. 107; C. S., s. 3316; 1943, c. 750.)

[Ed. Note: Subsections 1, 2, and 4 are omitted for the reason that they have no application to this case.]

§ 136-5. **Oath of office of commissioners.** — Before entering upon the performance of their duties, the chairman and each member of the State Highway and Public Works Commission shall take and subscribe to an oath of office before some person authorized to administer oaths that they *will faithfully support the Constitution of the State of North Carolina* and all laws enacted pursuant thereto and not inconsistent therewith, and that they will faithfully perform the duties of their respective offices. Said oaths shall be filed and preserved by the Commission as a part of its permanent records. (1921, c. 2, s. 6: C. S., s. 3846 (h); 1933, c. 172, s. 10.) (Emphasis added).

§ 136-6. **Bonds of commissioners and engineer.** — Before entering upon the performance of their duties,

the chairman and each member of the State Highway and Public Works Commission and the State Highway Engineer shall give a bond, to be fixed and approved by the Governor, conditioned upon the faithful discharge of the duties of their respective offices and the full and proper accounting for all public funds and property coming into their possession or under their control. The preimums on said bonds shall be paid out of the State Highway Fund. (1921, c. 2, s. 6; C. C., s. 3846(h); 1933, c. 172, s. 17.)

§ 136-18. **Powers of Commission.** — The said State Highway and Public Works Commission shall be vested with the following powers:

(a) The general supervision over all matters relating to the construction of the State highways, letting of contracts therefor, and the selection of materials to be used in the construction of State highways under the authority of this chapter.

(b) To take over and assume exclusive control for the benefit of the State of any existing county or township roads, and to locate and acquire rights of way for any new roads that may be necessary for a State highway system, with full power to widen, relocate, change or alter the grade or location thereof and to change or relocate any existing roads that the Commission may now own or may acquire; to acquire by gift, purchase, or otherwise, any road or highway, or tract of land or other property whatsoever that may be necessary for a State highway system: Provided, all changes or alterations authorized by this sub-section shall be subject to the provisions of §§ 136-54 to 136-63, to the extent that said sections are applicable: Provided, that nothing in this chapter shall be construed to authorize or permit the Commission to allow or pay anything to any county, township, city or town, or to any board of commission-

ers or governing body thereof, for any existing road or part of any road heretofore constructed by any such county, township, city or town, unless a contract has already been entered into with the Commission.

(c) To provide for such road materials as may be necessary to carry on the work of the State Highway and Public Works Commission, either by gift, purchase, or condemnation; Provided, that when any person, firm or corporation owning a deposit of sand, gravel or other material, necessary, for the construction of the system of State highways provided herein, has entered into a contract to furnish the Commission any of such material, at a price to be fixed by said Commission, thereafter the Commission shall have the right to condemn the necessary right of way under the provisions of chapter forty, to connect said deposit with any part of the system of State highways or public carrier.

(d) To enforce by mandamus or other proper remedies all legal rights or causes of action of the State Highway and Public Works Commission with other public bodies, corporations, or persons.

(e) To make rules, regulations and ordinances for the use of, and to police traffic on, the State highways, and to prevent their abuse by individuals, corporations and public corporations, by trucks, tractors, trailers or other heavy or destructive vehicles or machinery, or by any other means whatsoever, and to provide ample means for the enforcement of same; and the violation of any of the rules, regulations or ordinances so prescribed by the Commission shall constitute a misdemeanor: Provided, no rules, regulations or ordinances shall be made that will conflict with any statute now in force or any ordnance of incorporated cities or towns, except the Commission may regulate parking upon any street which forms a link in the State highway system, if said street be maintained with State highway funds.

(f) To establish a traffic census to secure information about the relative use, cost, value, importance, and necessity of roads forming a part of the State highway system, which information shall be a part of the public records of the State, and upon which information the State Highway and Public Works Commission shall, after due deliberation and in accordance with these established facts, proceed to order the construction of the particular highway or highways.

(g) To assume full and exclusive responsibility for the maintenance of all roads other than streets in towns and cities, forming a part of the State highway system from date of acquiring said roads. The State Highway and Public Works Commission shall have authority to maintain all streets constructed by the Commission in towns of less than three thousand population by the last census, and such other streets as may be constructed in towns and cities at the expense of the Commission, whenever in the opinion of the Commission it is necessary and proper so to do.

(h) To give suitable names to State highways and change the names of any highways that shall become a part of the State system of highways.

(i) To employ appropriate means for properly selecting, planting and protecting trees, shrubs, vines, grasses or legumes in the highway right-of-way in the promotion of erosion control, landscaping and general protection of said highways; to acquire by gift or otherwise land for and to construct, operate and maintain roadside parks, picnic areas, picnic tables, scenic overlooks and other appropriate turnouts for the safety and convenience of highway users; and to co-operate with municipal or county authorities, federal agencies, civic bodies and individuals in the furtherance of these objectives. No such roadside parks, picnic areas, picnic

tables, scenic overlooks or other turnouts, or any part of the highway right-of-way shall be used for commercial purposes and every use or attempted use of any such area for commercial purposes shall constitute a misdemeanor and each day's use shall constitute a separate offense.

(j) To make proper and reasonable rules, regulations and ordinances for the placing or erection of telephone, telegraph or other poles, sign boards, fences, gas, water, sewerage, oil, or other pipe lines, and other similar obstructions that may, in the opinion of the Highway and Public Works Commission, contribute to the hazard upon any of the said highways or in anywise interfere with the same, and to make reasonable rules and regulations for the proper control thereof. And whenever the order of the said Commission shall require the removal of, or changes in, the location of telephone, telegraph, or other poles, sign-boards, fences, gas, water, sewerage, oil, or other pipe lines, or other similar obstructions, the owners thereof, shall at their own expense move or change the same to conform to the order of the said Commission. Any violation of such rules and regulations or non-compliance with such orders shall constitute a misdemeanor.

(k) To regulate, abandon and close to use, grade crossings on any road designated as part of the State highway system, and whenever a public highway has been designated as part of the State highway system and the State Highway and Public Works Commission, in order to avoid a grade crossing or crossings with a railroad or railroads, continues or constructs the said road on one side of the railroad or railroads, the Commission shall have power to abandon and close to use such grade crossings; and whenever an underpass or overhead bridge is to use such grade crossings, the Com-

mission shall have power to close to use and abandon such grade crossing and any other crossings adjacent thereto.

(l) The said State Highway and Public Works Commission shall have such powers as are necessary to comply fully with the provisions of the present or future federal aid acts. The said Commission is hereby authorized to enter into all contracts and agreements with the United States government relating to the survey, construction, improvement and maintenance of roads under the provisions of the present or future congressional enactments, to submit such scheme or program of construction or improvement and maintenance as may be required by the Secretary of Agriculture or otherwise provided by federal acts, and to do all other things necessary to carry out fully the co-operation contemplated and provided for by present or future acts of Congress, for the construction or improvement and maintenance of rural post roads. The good faith and credit of the State are further hereby pledged to make available funds necessary to meet the requirements of the acts of Congress, present or future, appropriating money to construct and improve rural post roads and apportioned to this State during each of the years for which federal funds are now or may hereafter be apportioned by the said act or acts, to maintain the roads constructed or improved with the aid of funds so appropriated and to make adequate provisions for carrying out such construction and maintenance. The good faith and credit of the State are further pledged to maintain such roads now built with federal aid and hereafter to be built and to make adequate provisions for carrying out such maintenance. Upon request the Commission and in order to enable it to meet the requirements of acts of Congress with respect to federal aid funds apportioned to the State of North Carolina, the State Trea-

surer is hereby authorized, with the approval of the Governo" and Council of State, to issue short term notes from time to time, and in anticipation of State highway revenue, and to be payable out of State highway revenue for such sums as may be necessary to enable the Commission to meet the requirements of said federal aid appropriations, but in no event shall the outstanding notes under the provisions of this section amount to more than two million dollars ($2,000,000.00).

(m) The Sate Highway and Public Works Commission is authorized and empowered to construct and maintain all walkways and driveways within the Mansion Square in the city of Raleigh including the approaches connecting with the city streets and any funds expended therefor shall be a charge against general maintenance.

(n) The State Highway and Public Works Commission shall have authority to provide roads for the connection of airports in the State with public highway system, and to mark the highways and erect signals along the same for the guidance and protection of aircraft.

(o) The State Highway and Public Works Commission shall have authority to provide facilities for the use of water-borne traffic by establishing connections between the highway system and the navigable waters of the State by means of connecting roads and piers.

(p) The State Highway and Public Works Commission shall have authority, *under the power of eminent domain* (Emphasis added) and under the same procedure as provided for the acquirement of rights of way, to acquire title in fee simple to parcels of land for the purpose of exchanging the same for other real property to be used for the establishment of rights of way or for the widening of existing rights of way or the clearing of obstructions gerous hazards at intersections. Real property may be

acquired for such purposes only when the owner of the property needed by the Commission has agreed in writing to accept the property so acquired in exchange for that to be used by the Commission, and when, in the opinion of the Commission, an economy in the expenditure of public funds and the improvement and convenience and safety of the highway can be effected thereby.

(q) The State Highway and Public Works Commission is hereby authorized and required to maintain and keep in repair, sufficient to accommodate the public school buses, roads leading from the State-maintained public roads to all public schools and public school buildings to which children are transported on public school buses to and from their homes. And said commission is further authorized to maintain and repair sufficient parking facliities for the school buses at those schools.

(r) To administer, through the Division of Prisons, the State Prison System.

(s) To co-operate with appropriate agencies of the United States in acquiring rights of way for and in the construction and maintenance of flight strips or emergency landing fields for aircraft adjacent to State highways.

(t) To prohibit the erection of any informational, regulatory, or warning signs within the right of way of any highway project built within the corporate limits of any municipality in the State where the funds for such construction are derived in whole or in part from federal appropriations expended by the State Highway and Public Works Commission, unless such signs have first been approved by the State Highway and Public Works Commission. (1921, c. 2, s. 10; 1923, c. 160, s. 1; 1923, c. 172; 1933, c. 517, s. 1; 1935, c. 213 s. 1; 1935, c. 301; 1938 c. 297, s. 2; 1937, c. 407, s. 80; 1941, c. 47;

1941, c. 217, s. 6; 1943, c. 410; 1945, c. 842; 1951, c. 372; 1953, c. 437.)

§ 136-19. **Acquirement of land and deposits of materials; condemnation proceedings; federal parkways.** — *The State Highway and Public Works Commission is vested with the power to acquire such rights of way and title to such land, gravel, gravel beds, or bars, sand, sand beds or bars, rock, stone, boulders, quarries, or quarry beds, lime or other earth or mineral deposits or formations, and such standing timber as it may deem necessary and suitable for road construction, maintenance, and repair, and the necessary approaches and ways through, and a sufficient amount of land surrounding and adjacent thereto, as it may determine to enable it to properly prosecute the work,* **either by purchase, donation, or condemnation,** *in the manner hereinafter set out.* (Emphasis added) The Commission is also vested with the power to acquire such additional land alongside of the rights of way or roads as in its opinion may be necessary and proper for the protection of the roads and roadways, and such additional area as may be necessary as by it determined for approaches to and from such material and other requisite area as may be desired by it for working purposes.

Whenever the Commission and the owner or owners of the lands, materials, and timber required by the Commission to carry on the work as herein provided for, are unable to agree as to the price thereof, the Commission is hereby vested with the power to condemn the lands, materials, and timber, and in so doing the ways, means, methods, and procedure of chapter 40, entitled "Eminent Domain," shall be used by it as near as the same is suitable for the purposes of this section. (Emphasis added) and in all instances the general and special benefits shall be assessed as offsets against damages: Provided, that in all cases where the State Highway and Public Works

Commission upon the completion of the particular project, posts a notice at the courthouse door in each county wherein any part of the particular project is situate, and posts such notice in appropriate and suitable size at each end of the project for thirty (30) days to the effect that the project was completed as of a certain date named in the notice, any action for damages for rights of way or other causes shall be brought within six months from the date such notice was posted, and in all cases where the State Highway and Public Works Commission does not post notice as above set forth, any action may be brought within twelve months from the date of the completion of a particular project; Provided, however, that in no event shall the completion of a particular project be construed to be any date or time prior to the opening of the particular part or section of road in question to public use in a completed state.

In case condemnation shall become necessary the Commission is authorized to enter the lands and take possession of the same, and also take possession of such materials and timber as is required by it prior to bringing the proceedings for condemnation, and prior to the payment of the money for the said property. (Emphasis added.)

In the event the owner or owners shall appeal from the report of the commissioners, it shall not be necessary for the Commission to deposit the money assessed with the clerk, but it may proceed and use the property to be condemned until the final determination of the action.

The State Highway and Public Works Commission shall have the same authority, under the same provisions of law hereinbefore provided for construction of State highways, for the acquirement of all rights of way and easements necessary to comply with the rules and regulations of the United States government for the con-

struction of federal parkways in the State of North Carolina. The acquirement of a total of one hundred and twenty-five acres per mile of said parkways, including roadway and recreational and scenic areas on either side thereof, shall be deemed a reasonable area for said purpose. The right of way acquired or appropriated may at the option of the Commission, be a fee simple title, and the nature and extent of the right of way and easements so acquired or appropriated shall be designated upon a map showing the location across each county, and when adopted by the Commission, shall be filed with the registered of deeds in each county, and, upon the filing of said map, such title shall vest in the State Highway and Public Work Commission. The said Commission is hereby authorized to convey such title so acquired to the United States government, or its appropriate agency, free and clear of all claims for compensation. All compensation contracted to be paid or legally assessed shall be a valid claim against the State Highway and Public Work Commission, payable out of the construction fund of said Commission.

The action of the State Highway and Public Works Commission heretofore taken in the acquirement of areas for the Blue Ridge Parkway in accordance with the rules and regulations of the United States government is hereby ratified and approved and declared to be a reasonable exercise of the discretion vested in the said Commission in furtherance of the public interest.

When areas have been tentatively designated by the United States government to be included within a parkway, but the final survey necessary for the filing of maps as provided in this section has not yet been made, no person shall cut or remove any timber from said areas pending the filing of said maps after receiving notice from the State Highway and Public Works Commission that such area is under investigation; and any prop-

erty owner who suffers loss by reason of the restraint upon his right to use the said timber pending such investigation shall be entitled to recover compensation from the State Highway and Public Works Commission for the temporary appropriation of his property, in the event the same is not finally included within the appropriated area, and the provisions of this section may be enforced under the same law now applicable for the adjudgment of compensation in the acquirement of rights of way on other property by the State Highway and Public Works Commission. (1921, c. 2, s. 22; 1923, c. 160, s. 6; C. S., s. 3846(bb); 1931, c. 145, s. 23; 1933, c. 172, s. 17; 1935, c. 2; 1937, c. 42; 1949, c. 1115; 1953, c. 217.)

[Ed. Note: All of G. S. §§ 136-18 and 136-19 are set forth in this Appendix in order that the Court may see that no authority is granted for the police state methods used by Respondent. Therefore, we apologize for the great length needed to present these statutes.]

APPENDIX B

JUDGMENT

NORTH CAROLINA SUPREME COURT
FALL TERM 1955

No. 171 — New Hanover

W. A. CANNON

v.

CITY OF WILMINGTON, NORTH CAROLINA, AND NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION

Appeal by plaintiff from Sink, Emergency Judge, May Civil Term, 1955, of New Hanover.

The complaint, summarized, alleges: (1) that plaintiff is the owner and *in possession* of a described tract of land in the subdivision known as "Sunset Park" Wilmington, North Carolina; (2) that defendants claim an estate or interest adverse to plaintiff, to wit, a perpetual right of way or easement on and over said land for a city street and State highway, but have not made or attempted to make any use of such right of way or easement except over a described area at the southern end of said tract; (3) that "the said claim of the defendants is not valid either in law or in fact because neither of the defendants has, in any manner or way, obtained any valid legal or equitable title thereto, by deed, conveyance, or any process of law, or otherwise, nor have either of the defendants in any way or manner compensated the plaintiff for the said property, estate, or interest therein which they so claim"; (4) that said ad-

verse claims constitute a cloud upon plaintiff's title and on account thereof plaintiff has been damaged in relation to his ability to use, rent or sell his land; and (5) that "the defendants have done nothing to limit, bound, and describe their said claims."

Plaintiff prays (1) for removal of the cloud on title allegedly caused by defendants' adverse claims, (2) for recovery of damages of $70,000.00 allegedly caused by such adverse claims, if such adverse claims are removed by judgment herein, or (3) in the event defendants' right of way claims are adjudged valid to recover $106,200.00 as compensation for the taking of plaintiff's land for such public use.

Each defendant demurred separately to the complaint.

Upon the hearing below, the court entered separate judgments sustaining the demurrers. Plaintiff appealed from each judgment; and upon appeal plaintiff assigns error as to each judgment.

W. P. Burkhimer for plaintiff, appellant.

Wm. B. Campbell and Louis J. Poisson, Jr., for defendant City of Wilmington, appellee.

R. Brookes Peters, General, Counsel, and Louis J. Poisson, Jr., Associate Counsel, for defendant North Carolina State Highway and Public Works Commission, appellee.

BOBBITT, J. The State Highway and Public Works Commission is an unincorporated governmental agency of the State and not subject to suit except in the manner expressly authorized by statute. *Moore* v. *Clark*, 235 N. C. 364, 70 S.E. 2d 182, and cases cited. Hence, the demurrer of the defendant Commission, grounded on the court's lack of jurisdiction to entertain this action against it, was properly sustained.

True, when private property is *taken* under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain an action to obtain just compensation therefore. *Sale* v. *Highway Comm.*, ___ N.C. ___, ___ S.E. 2d ___; *Eller* v. *Board of Education*, ___ N.C. ___, ___ S.E. 2d ___. But this exception to the general rule has no application here.

Here plaintiff alleges expressly, as set out above, that defendant Commission has no valid claim of right of way over plaintiff's land. Rather, plaintiff seeks to remove as a cloud on plaintiff's title defendant Commission's alleged *invalid* adverse claims.

If and when defendant Commission, in the exercise of the power of eminent domain conferred upon it by statute, G.S. 136-19 and G.S. 40-12 et seq., takes plaintiff's land or any interest therein for highway purposes, plaintiff's remedy is by special proceeding as provided in G.S. 40-12.

Plaintiff declares that he is aggrieved because defendants have done nothing "to limit, bound, and describe with particularity the boundaries of their said claims." **Certainly, if defendant Commission claims a right of way over plaintiff's land, plaintiff is entitled as a matter of right to require that defendant define with particularity the location and extent of its claim; and, if it refuses or fails to do so, plaintiff can invoke the remedy of mandamus.** The statutory procedure described in G.S. 40-12 for the award of just compensation to the owner of private property appropriated to public use presupposes that the owner shall know with certainty the exact limits of the appropriation made by defendant Commission. (Emphasis added.)

Defendant City of Wilmington demurred for that it appears upon the face of the complaint "that this action has been instituted to determine the taking of and the location of the highway right of way by the defendants over a portion of the area referred to in the Complaint, and that the Court has no jurisdiction of the parties with respect to the alleged cause of action and no jurisdiction of the alleged civil action as set out in the Complaint; and for that it further appears upon the face of the Complaint that the alleged cause of action is based upon trespass by the defendants, who separately and jointly are by law vested with the power of eminent domain."

The contention of defendant City that the court lacks jurisdiction to entertain this action is without merit. The rule applicable to defendant Commission does not apply to a municipal corporation. A municipal corporation may "sue and be sued in its corporate name." G.S. 160-2.

Here plaintiff alleges that defendant City claims, without legal right thereto, a right of way on and over his land, and that such claim is a cloud on his title. The demurrer admits the facts stated in these allegations. Hence, nothing else appearing, the complaint contains allegations of fact sufficient to state a cause of action within the purview of G.S. 40-10, which provides for an action to remove a cloud from title.

Since the complaint states one cause of action against defendant City, this is sufficient ground for overruling its demurrer. *Kindley* v. *Privette*, 241 N.C. 140, 84 S.E. 2d 660, and cases cited. Hence, we do not discuss whether plaintiff has alleged facts sufficient to constitute a cause of action for damages against defendant City.

The motion by defendant City to dismiss the appeal under Rule 21 is denied. The appeal itself is considered an exception to the judgment and any other matters

appearing upon the face of the record. The pleadings are part of the record proper. *Gibson* v. *Ins. Co.*, 232 N.C. 712, 62 S.E. 2d 320.

As to demurrer of defendant State Highway and Public Works Commission: Affirmed .

The conclusions reached are: the judgment sustaining the demurrer of the defendant Commission is affirmed; and the judgment sustaining the demurrer of the defendant City is reversed. The costs on appeal are to be paid, one-half by the plaintiff and one-half by the Defendant City.

As to demurrer of defendant City of Wilmington: Reversed.

Winborne and Higgins, JJ., took no part in the consideration or decision of this case.

Office - Supreme Court, U.S.
FILED
AUG 20 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 291

W. A. CANNON, *Petitioner*

v.

NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION, *Respondent*

Petition for a Writ of Certiorari to the Supreme Court of the State of North Carolina.

APPENDIX C

W. P. BURKHIMER,
28 Odd Fellows Bldg.
Wilmington, N. C.

H. EDMUND RODGERS,
506 Murchison Bldg.
Wilmington, N. C.

Counsel for Petitioners.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Laws Involved	4
Statement	4
Reasons for Granting the Writ	7
Conclusion	18

	Appendix Page
APPENDIX A	
U. S. Constitutional Provisions	1
N. C. Constitutional Provisions	2
Statutes	4
APPENDIX B	
Opinion in *Cannon* v. *City*	18
APPENDIX C	
Judgment in *This* Case	23 (See Supplement)

TABLE OF CASES CITED

Cannon v. *City of Wilmington*, et al., 242 N. C. 711, 89 S. E. 2d 595 (1955) 2, 6, 7, 8, 11, 13, 17

Eason v. *Spence*, 232 N. C. 579, 61 S. E. 2d 717 10

Eller v. *Board of Education*, 242 N. C. 584, 89 S. E. 2d 144 (1955) 10, 11

Ivester v. *City of Winston-Salem*, 215 N. C. 1, 1 S. E. 2d 88 ..... 8, 10

McKinney v. *City of High Point*, 237 N. C. 66, 74 S. E. 2d 440 (1953) 8, 11

McKinney v. *City of High Point*, 239 N. C. 232, 79 S. E. 2d 730 (1954) 8

Moore v. *Clark*, 235 N. C. 364, 70 S. E. 2d 182 (1952) 8

Proctor v. *State Highway, etc., Comm.*, 230 N. C. 687, 55 S. E. 2d 479 (1949) 8, 10

Rhodes v. *City of Durham*, 165 N. C. 679, 81 S. E. 938 8

Sale v. *State Highway and Public Works Commission*, 242 N. C. 612, 89 S. E. 2d 290 (1955) 10, 11

Sanders v. *Atlantic Coast Line R. Co.*, 216 N. C. 312, 4 S. E. 2d 902 10

TABLE OF LAWS CITED

CONSTITUTIONAL PROVISIONS

	Page
Preamble to U. S. Constitution	14
First Amendment to U. S. Constitution	4
Fifth Amendment to U. S. Constitution	3, 4, 6, 8, 15
Fourteenth Amendment to U. S. Constitution, § 1	3, 4, 6, 14, 15

NORTH CAROLINA CONSTITUTION

Article I

§ 1	3, 4
§ 2	4
§ 9	3, 4
§ 17	3, 4, 6, 8, 10, 17
§ 18	4, 14
§ 19	3, 4, 14
§ 29	4, 17, 18
§ 35	3, 4, 14
§ 37	4, 16
Article IV, § 9	1, 4, 6

STATUTES

28 U. S. C., § 1257(3)	2

General Statutes of North Carolina:

§ 1-228	4, 12
§ 7-8	1, 4, 6
§ 7-9	1, 4, 6
§ 40-12 (Chapt. 40, "*Eminent Domain*")	8, 10, 11, 17
§ 47-27	4, 12
§ 136-5	4, 6
§ 136-6	4, 6
§ 136-18	4, 6
§ 136-19	4, 6, 10, 17

APPENDIX C

JUDGMENT

NORTH CAROLINA SUPREME COURT
SPRING TERM, 1956

W. A. CANNON

v.

NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION

No sufficient cause having been made to appear why the Court should issue the order applied for, the application is denied at the costs of the applicant.

This 21st day of March, 1956.

HIGGINS, J.,
For the Court.